

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
DELTA DIVISION

VICTOR AND VIVIAN MALATESTA  
Plaintiffs

V.

NO. 2:95CV119-B-O

TUNICA COUNTY SHERIFF'S DEPARTMENT,  
SHERIFF JOHN J. PICKETT, III,  
Privately and in his Official Capacity,  
OFFICER JEFF KILLION, Privately and  
in his Official Capacity, UNKNOWN LAW  
ENFORCEMENT AGENCIES AND OFFICERS in  
their Private and Official Capacities,  
TUNICA COUNTY, MISSISSIPPI, and CITY OF  
TUNICA POLICE DEPARTMENT  
Defendants

**MEMORANDUM OPINION**

This cause comes before the court upon the defendants' motions to dismiss.<sup>1</sup> The court has duly considered the parties' memoranda and is ready to rule.

**FACTS**

The facts, as set forth in the plaintiffs' complaint, are as follows. The plaintiffs, residents of Shelby, Mississippi, went to Fitzgerald's Casino in Tunica County on August 28, 1994. Upon leaving the casino, the plaintiffs struck a van in the parking lot

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<sup>1</sup> The defendants Tunica County Sheriff's Department, Sheriff Pickett, and Tunica County, Mississippi, have filed a joint motion to dismiss. The defendant City of Tunica Police Department has filed a separate motion to dismiss. The plaintiffs have previously dismissed their claims against Officer Jeff Killion.

as they were backing out of their parking space. Mr. Malatesta checked the van and, finding no damage, proceeded home.

While passing through the City of Tunica, the plaintiffs were pulled over for leaving the scene of an accident. Several police officers were present. Mr. Malatesta was arrested and taken to jail. In the process of being arrested, Mr. Malatesta claims that the officers physically abused him. After being held for several hours at the jail, Mr. Malatesta was released without any charges being filed against him.

On August 28, 1995, the plaintiffs filed suit against the Tunica County Sheriff's Department, Sheriff John Pickett, Tunica County, Officer Jeff Killion, and Unknown Law Enforcement Agencies and Officers. In their complaint, the plaintiffs assert a cause of action pursuant to 42 U.S.C. § 1983 for violation of the plaintiffs' rights under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments. The plaintiffs further assert a variety of state law claims, including assault and battery, false arrest, abuse of process, and negligence. On October 27, 1995, the plaintiffs amended their complaint to name the City of Tunica Police Department as a defendant.

#### **LAW**

The City of Tunica Police Department moves to dismiss the federal claims brought against it on the grounds that it has no legal existence for purposes of suit under § 1983. The Fifth

Circuit has previously addressed the issue of a police department's capacity to be sued in Darby v. Pasadena Police Dep't, 939 F.2d 311 (5th Cir. 1991), wherein the court stated:

In order for a plaintiff to sue a city department, it must "enjoy a separate legal existence." Pursuant to these principles, we have held that a political subdivision cannot pursue a suit on its own unless it is "a separate and distinct corporate entity." Accordingly, our cases uniformly show that unless the true political entity has taken explicit steps to grant the servient agency with jural authority, the agency cannot engage in any litigation except in concert with the government itself.

Darby has failed to show that the City of Pasadena ever granted its police department the capacity to engage in separate litigation. His suit, as it stands, seeks recovery from a legal entity that does not exist for his purposes. The district court therefore did not err by holding that Darby's suit was brought against an entity with no jural existence, and hence, subject to dismissal.

Darby, 939 F.2d at 313-314 (citations omitted). In the present case, the plaintiffs likewise have failed to show that the City of Tunica granted its police department the capacity to sue and be sued. Therefore, since the City of Tunica Police Department is not a proper party defendant, all claims brought against it should be dismissed.<sup>2</sup>

The plaintiffs have previously moved to substitute the City of Tunica as a named defendant in place of the Tunica Police Department. Under certain circumstances, substitution may be an

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<sup>2</sup> Although the Tunica Police Department only asserts this basis as grounds for dismissal of the § 1983 claim, the court finds that it must apply to all claims brought against the Tunica Police Department.

appropriate remedy, if there is no prejudice to the defendants. Darby, 939 F.2d at 314-315. However, this court is not called upon to judge the merits of a motion to substitute a party. The plaintiffs have previously filed such a motion which was denied by Magistrate Judge Eugene Bogen by order dated April 24, 1996. The plaintiffs have failed to object or appeal the magistrate judge's ruling, and therefore, the court finds that the denial of the plaintiffs' motion for substitution should stand.

The Tunica County Sheriff's Department, Sheriff Pickett and Tunica County (hereinafter "the County defendants") move to dismiss the § 1983 claims brought against the County defendants on the grounds that the plaintiffs have failed to state a claim upon which relief may be granted. The County defendants assert that there is no respondeat superior liability under § 1983, to which the plaintiffs readily concur. See Monell v. Department of Social Servs., 436 U.S. 658, 691-694, 56 L. Ed. 2d 611, 636-638 (1978). The County defendants further maintain that the plaintiffs have failed to identify a policy or custom of the defendant municipality which proximately caused injury to the plaintiffs, as is required to assert a § 1983 cause of action against a governmental entity. Monell, 436 U.S. at 690-694, 56 L. Ed. 2d at 635-638. However, the plaintiffs' complaint alleges that the County defendants failed to properly discipline and control their officers, who were known to be irresponsible in dealing with citizens of the community, and

failed to take adequate precautions in hiring, promoting and training its officers. The plaintiffs further allege that the abuse to which the plaintiffs were subjected was an institutionalized practice of the sheriff's department which was known and ratified by the County defendants. The court finds that such allegations are sufficient to identify a policy or custom of the County defendants, so as to state a claim under § 1983.

The County defendants further move to dismiss the claims brought against Sheriff Pickett in his individual capacity on the grounds of qualified immunity. While the plaintiffs have failed to allege in their complaint that Sheriff Pickett was an actor in the incident in question, they have made the allegations cited above regarding failure to discipline officers, failure to properly hire and train, and ratifying the abusive practices of his deputies. Supervisory officials may be held individually liable under § 1983 if their own action or inaction, including a failure to properly supervise, amounts to gross negligence or deliberate indifference which is a proximate cause of a constitutional violation. Cantu v. Rocha, 77 F.3d 795, 807 (5th Cir. 1996); Bowen v. Watkins, 669 F.2d 979, 988 (5th Cir. 1982); see also Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir. 1987) (supervisory liability exists if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights or is a proximate cause of the constitutional violation). While qualified immunity may be

available as a defense to the claims brought against Sheriff Pickett, at this stage in the proceedings, the plaintiffs have alleged sufficient facts which, if proven, could show that Sheriff Pickett's actions proximately caused a violation of the plaintiffs' clearly established constitutional rights.

#### **CONCLUSION**

For the foregoing reasons, the court finds that the City of Tunica Police Department's motion to dismiss should be granted and the County defendants' motion to dismiss should be denied.

An order will issue accordingly.

THIS, the \_\_\_\_\_ day of June, 1996.

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NEAL B. BIGGERS, JR.  
UNITED STATES DISTRICT JUDGE